STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

Amalgamated Transit Union No. 381, AFL-CIO,	In re ULP Nos. 26-98 and 27-98
Complainant/Defendant,	Findings of Fact, Conclusions of Law and Proposed Order
versus	
Board of Trustees, Butte School District No. 1 and **Jack McCormick,**	
Defendants/Complainants.	

I. Introduction

Hearing officer James Keil conducted a formal hearing in this matter on September 2, 1998, in Butte, Montana, under authority of §39-31-406, MCA, in accord with the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA. The parties stipulated that Unfair Labor Practice (ULP) Nos. 26-98 and 27-98 be combined. Amalgamated Transit Union, Local No. 381, AFL/CIO ("the union") is the complainant in ULP No. 26-98 and Butte School District 1 ("the district") is the complainant in ULP No. 27-98. Matthew Thiel represented the union and Patrick Sullivan represented the district. Witnesses included Donald Hansen, the union's International Vice-President; Marlene Malyevac, Vice-President of Local 381; Michael Dahlem, the union's former representative; Michelene Boysza, union trustee; Rosemarie Brock, a district trustee; Jack Richardson, the district's Business Manager; Robert Brown, attorney with Poore, Roth & Robinson; and Jack McCormick, the district's Personnel Director. Documentation admitted into the record without objection included the union's exhibits A through G and the district's exhibits 4055 through 4152. The parties submitted post-hearing and reply briefs and submitted the case on October 21, 1998.

II. Issues

1. Whether the union violated §39-31-402(2) MCA by:

   a. bargaining regressively and unfairly on October 14, 1997, February 2, 1998, and February 19, 1998,

   b. beginning a strike before a fact finder's report was issued, and

   c. attempting to bargain directly with individual trustees.

2. Whether the district violated §39-31-401(1) and (5) MCA by:

a. making false representations about its agreements with other bargaining units and/or the comparative wages of the involved employees versus comparable employees of other AA school districts,

b. attempting to persuade the fact finder to breach an agreement entered into by the parties,

c. stating that it would not consider the union's latest proposal until being informed that an unfair labor practice charge was being prepared, and

d. threatening to retaliate against union members if the union did not accept its offer.

Amended Prehearing Order, July 6, 1998.

III. Findings of Fact

1. The union is the exclusive bargaining representative for the district's school bus drivers, monitors and playground monitors. On July 22, 1997, the union and District began collective bargaining for new agreements for each of the units for the 1997-1998 and 1998-1999 school years. Don Hansen, International Vice-President, served as the union's chief negotiator. Jack McCormick, Personnel Director, served as the district's chief negotiator. (Testimony of Hansen and McCormick)

2. Before bargaining with the union on the three units, the district had already reached settlement on most other contracts. The "word-on-the-street" was that it had settled those contracts for a 1% increase in base pay. (Testimony of Hansen)

3. Historically, the union and district bargained on all three units separately on the same day. On July 22, 1997, McCormick stated the district was bound to no more than 1% and he made an initial proposal of .25% raise in the base pay for the playground monitors. He offered no raises to the bus drivers or monitors. (Testimony of Hansen and McCormick; Exhibits D1 and 4089, 4090, 4098, 4099 and 4109)

4. The union has resisted negotiating on percentages for these three units because of their low wage rates and lack of a step-and-lane pay matrix. They could rely on raises and longevity increases only, which could not keep pace with most other district employees, such as teachers, who enjoyed not only higher salaries but also longevity and step-and-lane increases. The union viewed a 1% raise for all employees regardless of their job and wage as unfair. (Testimony of Hansen)

5. The union and district next met on August13, 1997. McCormick initially refused to move off of his previous offer because "the district had no extra money." He suggested that the union try to come up with money by finding and identifying another source of funds. Hansen asked for the district's last best offer, to which McCormick

replied it would be no more than 1%. Hansen said he would take the offer back to the union but told McCormick he did not think the members would accept. (Testimony of McCormick, Hansen, Malyevac, and Boysza; Exhibits D2 and 4091, 4100 and 4110)

6. At no time during the August 13, 1997, bargaining session did Hansen state or indicate he would recommend to the union members that they agree to the district's offer or that he and McCormick had reached a tentative agreement. The parties did not reach an agreement, tentative or otherwise, on August 13, 1997. (Testimony of Hansen, McCormick, Malyevac and Boysza; Exhibit D2)

7. The union and district next met on October 14, 1997. At that time, Hansen advised McCormick that the union members had rejected the August 13 offer. McCormick responded that he was under the impression that they had reached a tentative agreement at the August 13 meeting. He then removed the district's offer of 1% and put the offer again at .25%, which would apply again only to the playground monitors. (Testimony of Hansen, McCormick, Malyevac and Boysza; Exhibits D3 and D4)

8. McCormick also made a comment at the October 14 session that the district had always accommodated the union by negotiating the three contracts together but that in the future it might not be willing to do so. (Testimony of Hansen) The union viewed this as retaliation by causing it inconvenience and costing it more money. (Testimony of Hansen)

9. McCormick viewed the August 13 offer of 1% as a "package deal" and thought the union's rejection of it made it moot so the district's last offer (.25%) automatically went back into effect. McCormick did advise the union on October 14 that the district would still be willing to agree to a 1% pay increase for all three of the involved bargaining units. (Testimony of McCormick)

10. Because it appeared at the October 14 bargaining session that the parties were making no progress, Hansen suggested that the matter be mediated and McCormick agreed. Board of Personnel Appeals mediator Paul Melvin conducted mediation sessions on December 9 and 10, 1997. During that time, the district returned to its offer of 1%, which the union again rejected. (Testimony of Hansen and McCormick; Exhibits D5 through D8) The union requested binding arbitration. The district refused arbitration but agreed to participate in a fact finding hearing. (Testimony of Hansen)

11. The union took a strike vote around mid-December. The membership authorized a strike but did not vote to strike at that time. The union never agreed not to strike and the contract, which had expired, did not prohibit a strike. (Testimony of Hansen and Dahlem)

12. Michael Dahlem represented the union during the factfinding session, which occurred on February 2, 1998. At the beginning of factfinding, the district's offer stood at 1% for all three units and the union's request stood at 1% plus additional holidays (3 for the bus drivers and 4 for the monitors) and an additional $50.00 per month contribution by the district toward health insurance premiums for the playground

monitors. At the conclusion of factfinding, the factfinder concluded the union's demands were too high and asked if it could make another offer. The union then proposed a $.15 per hour wage increase for all three units plus $50.00 per month contribution toward the playground monitors' insurance premiums. This represented $15,498.00 less than the previous union demand. (Testimony of Dahlem)

13. Despite the significant reduction in the union's demand, McCormick would not agree to the latest proposal until he first presented it to the school board, which was next scheduled to meet February 16, 1998. The factfinder suggested that he hold his decision until after the board meeting on the 16th which might save money and time if the board responded favorably. Both Dahlem and McCormick agreed with that and McCormick further agreed he would present the proposal to the board with a recommendation that they consider further action. (Testimony of Dahlem, McCormick, Malyevac and Boysza)

14. The union members in attendance at the fact finding session did not want to wait until the regularly scheduled board meeting to have their latest proposal addressed. They asked McCormick if he would arrange a special board meeting but he said he did not think they would agree. A board member in attendance, Joan Hope, suggested that the union contact school board members to see if they could get a special call meeting set up. Such a meeting would require that at least two board members agree to the meeting and that at least four board members be in attendance. Dahlem indicated he thought that might be a good idea but he did not instruct any union members to contact board members. (Testimony of Malyevac and Boysza)

15. The evening of February 2, 1998, Malyevac called board members Morris, Joan Cassidy and Rose Brock and Boysza called board members Rose Brock, Joe Murphy and Dale Carpenter. They asked all the members contacted if they would be willing to participate in a special call meeting and whether they would be willing to call the meeting if the chairperson refused to do so. (Testimony of Malyevac and Boysza) Malvevac and Boysza talked mostly in general terms to the board members, with the exception of Murphy who was not receptive, about such things as the dedication of the employees and need for alternate funding sources. They asked if the board members had any ideas. They also mentioned offers made by the parties and asked that they support the union's position. (Testimony of Malyevac and Brock) Neither Malyevac nor Boysza attempted to negotiate with Brock. (Testimony of Brock) They did not attempt to negotiate with the other board members either. (Testimony of Malyevac and Boysza)

16. Also on February 2, 1998, Dahlem telephoned Robert Brown, an attorney who the district relies on for legal advice but who was not involved in the collective bargaining negotiations. Dahlem attempted to educate him about what had transpired in the course of negotiations, telling him about the amounts and percentages that had been discussed. Brown thought Dahlem should be talking to McCormick instead, and conferenced him into the conversation. During the course of their conversation, McCormick made a comment to Dahlem that the bus driver services had been contracted out to the private sector in other school districts. Dahlem perceived McCormick's comment as a threat that the bus driver positions may be in jeopardy if the union did not

accept the district's offer. (Testimony of Dahlem) Brown did not perceive McCormick's comment as a threat that the bus drivers would be fired and their jobs contracted out. (Testimony of Brown) McCormick could not act independent of the board to contract out bus services. (Testimony of McCormick)

17. On February 3, 1998, McCormick faxed to the factfinder, with a copy to Dahlem, a letter detailing the union's offers before and after fact finding. His calculations showed that while the request for bus drivers and monitors declined by .9% and .8%, respectively, the request for playground monitors increased by 1.35%. This represented a net monetary increase for playground monitors of $671.00 and a decrease for the three units as a whole of $15,498.00. (Exhibit 4150) Following his comparisons, McCormick went on to write:

> It is obvious, from both the percentage increases and the total dollars, that the offer with regard to the Playground Monitors is regressive in nature. This is a pattern that has developed in the course of these negotiations. Based upon that conclusion, it is my recommendation to the Board of Trustees that they take no action on the offers made by ATU.
>
> We have requested the help of a factfinder in this dispute and I believe that we should allow that process to come to its obvious conclusion, with the preparation of your report. My recommendation is founded upon the regressive nature of their offer.
>
> Although the parties have waived your time limit to complete your recommendation, the district, in that they will not be voting on the offers extended by ATU, request that you complete your report as soon as your schedule allows. If the report could be completed by the Board Meeting on February 16th, they could give consideration to the report at that time.

(Exhibit 4151)

18. At no time during the telephone conversation of February 2, 1998, or thereafter, did McCormick request that the union revise the playground monitors' requested increase. (Testimony of McCormick)

19. McCormick's February 3, 1998 letter to the factfinder shocked Dahlem and angered the union members. The board also failed to respond to their request for a special call meeting. The union went on strike on February 11. (Testimony of Dahlem) Then on February 18 the district obtained a temporary restraining order against the strike. (Testimony of McCormick)

20. On February 11, 1998, Butte School District Superintendent Bob Miller made the following statement, which appeared on the evening news broadcast: "They wanna walk out and hold these kids hostage. I guess I kinda look at it as that's what it is and we don't deal with hostage people." (Exhibit G) Then on February 15, 1998, the Montana Standard ran an editorial written by School Board Chairman, Joe Murphy. This article stated that "Butte School District bus drivers and monitors, compared to bus drivers and

monitors in other AA school districts as to salaries and benefits, are No. 1" and that all other Butte school district employees received only 1% wage and benefits increases while the union was "striking for a 2 percent to 6 percent increase." (Exhibit C)

21. Mediation again started on February 18, 1998. The union made an oral offer of $.18 per hour increase for the bus drivers, a $.14 per hour increase for the monitors and a $.15 per hour increase for the playground monitors with a $25.00 increase in insurance premium payments by the district. The district replied that the offer was regressive with respect to the bus drivers. The union then made a written offer of $.15 for the bus drivers, $.14 for the monitors and withdrawal of all demands for insurance premiums. (Testimony of Dahlem)

22. On February 19, McCormick told Melvin a 1.5% increase would be acceptable but wanted it in writing from the union. Melvin brought back a written proposal from the union for a 1.5% wage increase and McCormick said the district would agree provided that the money for the increases could be taken from the entry level wages of new employees of the units. The union rejected that offer because taking the money out of entry level wages was not acceptable to the membership. The mediation then terminated without an agreement. (Testimony of Dahlem and McCormick; Exhibit 4152)

23. On March 5, 1998, the union and district met again. The union asked for 1.5% and the district countered with an offer of 1% plus $.20 per hour. The union then suggested that the money for the wage increases be taken out of the wages for substitutes, who were not union members. The district thought the idea had merit and went over the figures that night. (Testimony of Dahlem, McCormick and Boysza)

24. On March 6, 1998, Melvin again acted as mediator for the parties. He told the union that if it dropped the demand for additional insurance premiums for the playground monitors things might go a little more smoothly. The union then asked for 1.5% and dropped the demand for the insurance premiums. After negotiating most of the day, the district told Melvin that they would pay 1.5% by lowering substitute wages with no money coming out of entry level wages for the unit's new employees. Melvin said he thought they had a deal. He then took the offer to the union. He returned much later and informed the district that the union had rejected the offer and now asked for a 2% increase. (Testimony of McCormick, Richardson and Boysza)

25. Representative Quilici came to the mediation on March 6 and demanded to know why the district would not settle with the union. They explained to him what the union's latest offer had been. Quilici then went to speak with the union. The union then returned to their offer of 1.5%. The mediation concluded about 6:00 p.m. that day with a settlement. (Testimony of Richardson)

IV. Discussion

Montana law prohibits unfair labor practices in public sector employment. The law defines the failure to bargain collectively in good faith as an unfair labor practice. §§39-31-305, 39-31-401, and 39-31-402, MCA.

The Board of Personnel Appeals applies the totality of conduct standard when deciding whether a party has failed to bargain in good faith. *MPEA v. City of Great Falls*, ULP #19-85 (1986); *MEA v. Laurel School District*, ULP #40-93 (1995).

a. The ULP claims against the union

The district asserted unfair labor practice claims against the union on five grounds. The first three claims were that the union bargained regressively and unfairly on three particular dates (October 14, 1997, February 2, 1998 and February 19, 1998). The fourth claim was that when the union struck without waiting for the fact-finding report it engaged in an unfair labor practice. The fifth claim was that the union attempted to bargain with individual members of the board of trustees, by-passing the district's representative.

The district failed to prove that the union agreed, on August 13, 1997, to a 1% wage increase for all three bargaining units. Consequently, the district cannot prove that the union engaged in an unfair labor practice on October 14, 1997, by reneging on a non-existent agreement. The first claim of a union unfair labor practice fails on that basis.

On February 2, 1998, the union offered a package proposal for all three bargaining units that reduced the overall cost to the district by approximately $15,000.00. However, the cost to the district of the proposal for the playground monitors increased by $671.00. Under the circumstances, including the union's subsequent offers that eliminated the regressive feature, the district has failed to prove bad faith. The second claim of a union unfair labor practice fails.

The district failed to prove that the union engaged in any regressive bargaining on February 19, 1998. The day before, the union had made an offer that the district considered regressive regarding the bus drivers. The union withdrew that offer after the district called it regressive. This conduct on February 18, 1998, was regressive, but was remedied during the same day of bargaining. The district did not prove any bad faith bargaining. Subsequently, on March 6, 1998, the union did engage in regressive bargaining, by suddenly demanding a 2% wage increase after the district had accepted a union offer for a 1.5% increase. The district specifically referenced the February 18 exchange of offers and accusations in its contentions, in the amended prehearing order. The district did not reference the March 6 regressive offer in its contentions, but the union did have sufficient notice of this claim, as part of the alleged pattern of regressive and illegal bargaining. *Board of Trustees v. State ex rel Bd. Pers. App.*, 185 Mont. 104, 108, 604 P.2d 778 (1979). Again, cooler heads prevailed, as they had on February 18, and the union reconsidered and accepted the 1.5% wage increase it had previously offered and then rejected. Thus, although the union might have been guilty of bad faith bargaining had it continued to insist upon the regressive 2% increase, it remedied the problem by abandoning the position. The district has sustained its third claim of regressive bargaining at a *de minimis* level that does not rise to an unfair labor practice, viewed pursuant to the totality of conduct standard.

The union struck after the district reneged on its agreements during the fact-finding. Whether or not the district was correct in claiming that the union's regressive bargaining obviated any district obligation to stand by its agreements, the district has offered neither factual nor legal support for its claim that striking without waiting for the fact-finding was an unfair labor practice. Quoting language from a TRO that (as far as this record reveals) the district may have obtained *ex parte* falls far short of establishing that the strike was wrongful. Under these circumstances, the fourth claim of a union unfair labor practice fails.

The district failed to prove that the union attempted to bargain with individual trustees. At the suggestion of a member of the board of trustees, union members contacted board members about a call meeting, and did not attempt to negotiate with the board members. Although the district representative was understandably upset that union members were talking to board members, union members did not attempt to bargain directly with board members. Under these facts, the fifth claim of a union unfair labor practice fails.

b. The ULP claims against the district

The union asserted unfair labor practice claims against the district on four grounds. The first claim was that the district made false representations about its agreements with other collective bargaining units. The second claim was that the district engaged in bad faith when it reneged on its agreement to respond to the union's last offer before fact-finding. The third claim was that the district engaged in an unfair labor practice when it refused to consider the union's "regressive" offer before the fact-finder. The fourth claim was that the district made coercive statements both about contracting out bus driver services and about the striking units.

The union failed to prove that the district's statements about 1% increases for the other seven bargaining units were false. Those statements were true, although perhaps not complete (omitting any reference to starting wage 1% increases that could result in greater increases due to step, lane and longevity factors). Similarly, the union did not prove the falsity of allegations the three bargaining units were more highly paid than comparable employees in other AA school districts. The union did not prove that the district engaged in an unfair labor practice based either upon actual misrepresentation or upon incomplete representation motivated by bad faith. The first claim of a district unfair labor practice fails on that basis.

The district's decision not to respond to the union's last offer before fact-finding was purportedly triggered by the miniscule regressive playground monitor offer, within the context of the massive decrease in overall expense for the district in the entire package proposal. Technically this was a regressive offer, and it came at a time when union members had approached the district board members to call a special board meeting to consider the offer. Under the circumstances, even though the union's subsequent offers eliminated the regressive feature and the approach of the board members was proper, the union has failed to prove bad faith in the district's decision not

to respond to the union's last offer before fact-finding. The second claim of a district unfair labor practice fails.

The district's refusal to respond to that offer at all, based upon the playground monitor offer, triggered the strike. Two weeks later, the parties were bargaining again, after a TRO ended the strike. The union has failed to prove that the district had any obligation to respond to an offer that was technically regressive. There is also no evidence that the district at any time was unwilling to settle for McCormick's maximum initial authority (the 1% wage increase). The union did not prove any bad faith refusal to bargain. The third claim of a district unfair labor practice fails.

The district did make comments (in negotiations) about contracting out the bus drivers' services. Still, the union did not prove that Jack McCormick made these comments in the context of threatening the union's members as opposed to discussing the status of bus drivers in other comparable districts that contracted such services. The record falls short of demonstrating retaliatory threats veiled in comments about contracting services. More troubling are comments about "hostage-takers" made to the press. These comments were, on their face, coercive under the articulated standards of the Board. *Teamsters Local No. 53 v. Gallatin County Commissioners*, ULP No. 25-77. However, these heated comments, standing alone, do not demonstrate a concerted effort, over time, to interfere with the employees' right to engage in concerted activities. While troubling, the comments do not rise to an unfair labor practice in these circumstances. Thus the fourth claim of a district unfair labor practice fails.

The parties bargained aggressively. Both sides pushed the envelope, in efforts to obtain a more favorable settlement. Nevertheless, neither side crossed the line into unfair practice. Indeed, both sides engaged in the rather common tactic of accusing the other of unfair labor practices as a means of raising the ante for further negotiations. Under the facts of this case, viewing the entire dispute pursuant to the totality of circumstances standard, neither side is entitled to relief.

V. Conclusions of Law

1. The Department of Labor and Industry has jurisdiction to issue a proposed decision for Board of Personnel Appeals adoption. §39-31-406, MCA; 24.26.682 ARM.

2. Neither complaining party met its respective burden of proving its adversary breached any statutory duty to bargain collectively in good faith . Therefore, neither party committed an unfair labor practice.

3. Neither party is entitled to a Board of Personnel Appeals cease and desist order or other relief.

VI. Proposed Order

Unfair Labor Practice Complaint Nos. 26-98 and 27-98, Amalgamated Transit Union, Local No. 381, AFL-CIO and Board of Trustees, Butte School District No. 1 and Jack McCormick, are dismissed as not proved.

Dated: April 20, 1999

James L. Kehl, Hearing Officer
Montana Department of Labor and Industry

Notice of Aggrieved Parties' Rights

Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to A.R.M. 24.26.215 within 20 days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. §39-31-406(6) MCA. Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals,
Department of Labor and Industry
P.O. Box 1728
Helena, MT 59624-1728.